

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
<u>Computer III</u> Further Remand Proceedings:)	CC Docket No. 95-20
Bell Operating Company)	
Provision of Enhanced Services)	
1998 Biennial Regulatory Review --)	CC Docket No. 98-10
Review of <u>Computer III</u> and ONA)	
Safeguards and Requirements)	

To: The Commission

COMMENTS OF ADT SECURITY SERVICES, INC.

ADT Security Services, Inc. ("ADT"), by its attorneys, hereby responds to the Further Notice of Proposed Rulemaking ("FNPRM")^{1/} issued in the above-captioned proceeding on January 30, 1998.

As a leader in the provision of electronic security services to both residential and commercial customers, ADT is particularly concerned with the rule changes proposed in this proceeding which will impact the alarm monitoring industry. As discussed in greater detail infra, ADT's comments will focus primarily upon regulations governing Bell operating company ("BOC") participation in the alarm monitoring industry, as well as BOC provision of local network access to providers of alarm monitoring services.

^{1/} FCC 98-8 (January 30, 1998).

I. INTRODUCTION.

In this proceeding, the Commission reexamines its Computer III and Open Network Architecture ("ONA") rules^{2/} in an effort to: (i) "enable consumers and communities across the country to take advantage of innovative, 'enhanced,' or 'information' services offered by BOCs and other information service providers;" (ii) "ensure the continued competitiveness of the already robust information services market;" and (iii) "establish safeguards for BOC provision of enhanced or information services that make common sense in light of current technological, market and legal conditions."^{3/} ADT submits that, if the Commission is to achieve its goals with respect to the alarm monitoring industry, it must, at a minimum, continue to apply the safeguards adopted in the Computer III and ONA Proceedings to BOC participation in the alarm monitoring market. In addition, in order to most effectively

^{2/} See Amendment of Section 64.702 of the Commission's Rules and Regulations, Report and Order, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986), recon., 2 FCC Rcd 3035 (1987), further recon., 3 FCC Rcd 1135 (1988), second further recon., 4 FCC Rcd 5927 (1989), Phase I Order and Phase I Recon. Order, vacated, California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Phase II, 2 FCC Rcd 3072 (1987), recon., 3 FCC Rcd 1150 (1988), further recon., 4 FCC Rcd 5927 (1989), Phase II Order vacated, California I, 905 F.2d 1217 (9th Cir. 1990); Computer III Remand Proceedings, 5 FCC Rcd 7719 (1990), recon., 7 FCC Rcd 909 (1992), pets. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993); Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991), recon. dismissed in part, Order, CC Docket Nos. 90-623 and 92-256, 11 FCC Rcd 12513 (1996); BOC Safeguards Order vacated in part and remanded, California v. FCC, 39 F.3d 919 (9th Cir. 1994), cert. denied, 115 S.Ct. 1427 (1995) (collectively the "Computer III Proceedings"); and Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1 (1988), recon., 5 FCC Rcd 3084 (1990); 5 FCC Rcd 3103 (1990) (BOC ONA Amendment Order), erratum, 5 FCC Rcd 4045 (1990), pets. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993), recon., 8 FCC Rcd 97 (1993); 6 FCC Rcd 7646 (1991); 8 FCC Rcd 2606 (1993), pet. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993) (collectively the "ONA Proceedings").

^{3/} FNPRM at ¶ 1.

encourage increased competition in the local exchange marketplaces, ADT urges the Commission to expand its ONA unbundling rules to encompass the type of unbundling mandated by Congress in section 251 of the Communications Act of 1934 (the "Act"), as amended by the 1996 Telecommunications Act (the "1996 Act"). Maintaining and expanding these safeguards will be particularly critical if the recent decision of the United States District Court for the Northern District of Texas,^{4/} finding application of Sections 271-275 of the 1996 Act an unconstitutional bill of attainder, is upheld.

II. SAFEGUARDS ARE NECESSARY TO PRESERVE COMPETITION WITHIN THE ALARM MONITORING INDUSTRY.

A. The BOCs Have the Opportunity and Incentive to Discriminate Against Competitors in the Alarm Monitoring Industry.

Section 275 of the 1996 Act bans BOC "provision" of alarm monitoring services through February of 2001. However, the ban does not apply to provision of alarm monitoring services by Ameritech Corporation ("Ameritech"),^{5/} and has been interpreted not to apply to marketing of alarm monitoring services by any of the BOCs.^{6/} Therefore, many of the BOCs continue to compete in the alarm monitoring services market, either directly through provision of alarm monitoring services (as does Ameritech) or indirectly through marketing agreements with other providers.

^{4/} See SBC Communications, Inc. v. Federal Communications Commission, No. 7:97-CV-163-X, 1997 WL 800662 (N.D. Tex. Dec. 31, 1997), stayed, (N.D. Tex. Feb. 11, 1998), appeal pending (the "Texas Case").

^{5/} See Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing and Alarm Monitoring Services, Second Report and Order, 12 FCC Rcd 3824 (1997), reconsideration pending.

^{6/} See Southwestern Bell Telephone Company's Comparably Efficient Interconnection Plan for Security Services, 12 FCC Rcd 6496 (CCB 1997).

The continued active participation by the BOCs in the alarm monitoring marketplace creates strong incentives for anticompetitive BOC behavior.^{7/} Moreover, continued BOC control of access to local exchange networks provides the BOCs with the capacity to discriminate among providers of alarm monitoring services.^{8/} As the Commission explained: "Because the BOCs control the local exchange network and the provision of basic services, in the absence of regulatory safeguards they may have the incentive and ability to engage in anticompetitive behavior against [information services providers] that must obtain

^{7/} Ameritech has demonstrated its incentives in this respect by repeatedly violating the unambiguous letter and spirit of Section 275 by acquiring the alarm monitoring assets of numerous companies. Under Section 275(a)(2), Ameritech may not "acquire any equity interest in, or obtain financial control of, any unaffiliated alarm monitoring entity" until February of 2001. However, since the 1996 Act was enacted Ameritech has acquired all of the alarm monitoring assets of Circuit City Stores, Inc., Central Control Alarm Corp., Norman Security, Inc., Masada Security, Inc., Rollins, Inc., and Republic Security Company Holdings. These acquisitions have been challenged by the Alarm Industry Communications Committee ("AICC") in a series of motions filed with the Commission. See AICC Motion, CCB Pol 96-17 (filed August 12, 1996), AICC Motion, CCB Pol 96-17 (filed May 1, 1997), AICC Motion, CCB Pol 97-8 (filed July 2, 1997); AICC Emergency Motion, CCB Pol 97-11 (filed October 8, 1997). The Commission issued a Memorandum Opinion and Order in response to the first motion. See Enforcement of Section 275(a)(2) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Against Ameritech Corporation, CCB Pol 96-17, Memorandum Opinion and Order, FCC 97-102, at 2-3 (rel. March 25, 1997) ("Circuit City"). The United States Court of Appeals for the District of Columbia Circuit vacated and remanded the Circuit City decision in Alarm Industry Communications Committee v. Federal Communications Commission and United States of America, No. 97-1218 (December 30, 1997). The Commission has not ruled on any of the AICC's other motions. Therefore, all of the AICC's motions are currently pending before the Commission.

^{8/} Possible forms of BOC discrimination include, inter alia, providing limited or inferior access to local networks, manipulating the timing of changes in local networks, utilizing consumer proprietary network information to gain an unfair marketing advantage, or improperly shifting the costs of providing alarm monitoring services to BOC basic services.

basic network services from the BOCs in order to provide their information service offerings."^{9/} This reasoning holds equally true with respect to the alarm monitoring services marketplace.

B. Competitive Conditions Within the Local Exchange and Alarm Monitoring Marketplaces Have Not Changed and Do Not Provide a Rational Basis for Removing Any of the Commission's Computer III or ONA Safeguards.

In numerous contexts throughout the FNPRM, the Commission seeks comment on whether provisions of the 1996 Act or "other factors" reduce concerns about potential BOC anticompetitive behavior with respect to information services providers.^{10/} ADT submits that neither the 1996 Act nor any of the "other factors" cited by the Commission, including, inter alia, anticipated increased competition in the local exchange markets or information services markets, provide sufficient protection for alarm monitoring service providers against predatory BOC behavior.

Two factors addressed by the Commission are increased competition within local exchange markets and unbundled access rights granted to some potential BOC competitors under Section 251 of the Act.^{11/} To date, these factors have done little to lessen the ability of BOCs to utilize their monopoly power unfairly with respect to the alarm monitoring industry. Critically, Section 251 does not impose any duty or obligation on the BOCs to providers of alarm monitoring services. Although implementation of Section 251

^{9/} FNPRM at ¶ 43.

^{10/} For example, the Commission seeks comment on whether the 1996 Act and other factors should alleviate the California III court's underlying concern that the level of unbundling required under ONA does not provide sufficient protection against access discrimination by the BOCs in the information services marketplaces. FNPRM at ¶ 33-34.

^{11/} FNPRM at ¶¶ 33-34.

might eventually limit anticompetitive BOC behavior by facilitating creation of competitive local exchange markets, at this time, BOCs continue to control the local exchange markets. As long as alarm monitoring service providers remain dependent upon BOCs for access to their local networks, Section 251 and any anticipated increase in competition within local exchange markets do not serve to prevent anticompetitive BOC activity.

Another factor upon which the Commission seeks comment is heightened competition within information services markets.^{12/} The Commission asks whether heightened competition within those markets, and particularly the participation of large information service providers within those markets, diminishes the threat of access discrimination by the BOCs.^{13/}

With respect to the market for alarm monitoring services, ADT stresses that, although competition within the market is robust, there are no dominant competitors that have the ability to limit anticompetitive BOC conduct. There are approximately 12,000 local and regional competing providers of alarm monitoring services nationwide. While ADT has the largest market share, it serves just over 7 percent of the market, and faces substantial competition in every region in which it operates.^{14/} Neither ADT, nor any of its competitors, have the expertise or the resources to prevent the BOCs from discriminating against them in the provision of access to local exchange services. The particular vulnerability of alarm

^{12/} FNPRM at ¶ 36.

^{13/} Id.

^{14/} In the aggregate, the one hundred largest security firms serve only 25 % of the total market. See Laura E. Stepanek, Big Firms Get Bigger, Security Distributing & Marketing Magazine, May 1997, 82, 84. In 1996, total security industry revenues were \$13.2 billion, while ADT's revenues were \$993.8 million. Id.

monitoring providers to anticompetitive BOC conduct was recognized by Congress in enacting the 1996 Act:

[The alarm and telemessaging] industries have had problems with the local telephone companies. On several occasions, the Federal government has stepped in to ensure a level playing field. Thus, the concerns raised by the industry are real and not theoretical.^{15/}

In sum, competitive conditions within the local exchange and alarm monitoring marketplaces have not changed and do not provide a rational basis for removing any of the Commission's Computer III or ONA safeguards. Furthermore, Section 275's ban on BOC provision of alarm monitoring services -- assuming the ban is upheld on review of the Texas Case -- is set to expire in February of 2001. Elimination of this ban will create even greater opportunities for predatory BOC behavior. Therefore, ADT strongly supports continued application of all of the Commission's current nonstructural safeguards to the provision of alarm monitoring services by the BOCs and asks the Commission to clarify that these rules will continue to apply to BOC marketing of alarm monitoring services after the sunset of the Section 275 prohibition (or if the decision in the Texas Case is not reversed). In addition, ADT urges the Commission to facilitate increased competition in the local exchange markets by expanding its ONA unbundling rules to encompass the type of unbundling mandated by Congress in Section 251 of the 1996 Act.

CONCLUSION

Prior to the adoption of the 1996 Act, the alarm monitoring industry was a highly competitive, broadly diversified industry. This competition was enhanced and maintained by the Commission through its Computer III and ONA safeguard regimes. Neither

^{15/} H.R. REP. NO. 104-204, 104th Cong., 1st Sess., 87 (1995).

adoption of the 1996 Act, nor changes in the local exchange or alarm monitoring markets lessen the threat of predatory BOC behavior in the market for alarm monitoring services.

Because Congress recognized this threat, it banned most BOC participation in the alarm monitoring industry for five years. In so doing, Congress envisioned that changes in the telecommunications marketplace over the five years following passage of the 1996 Act, including the development of vigorous competition within local exchange markets and the unbundling of the BOCs' local networks, would enable current providers of alarm monitoring services to compete fairly with the BOCs in provision of alarm monitoring services. In order to facilitate development of these changes, and to ensure fair and efficient competition within the alarm industry in the meantime, the Commission should expand and continue to apply its safeguard provisions to BOC participation within the alarm monitoring services marketplace.

Respectfully submitted,

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